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Supreme Court of the United States.

OCTOBER TERM, 1943.

No. 521.

FRANKS BROS. COMPANY, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR PETITIONER.

BENJAMIN E. GORDON,
ARTHUR V. GETCHELL,
Attorneys for Petitioner.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

Subject Index.

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statement of the case	2
Petitioner's position	4
Argument	4
A. Representation in the unit as of March 5, 1942, the date of hearing before respondent	4
Conclusion	17

Table of Authorities Cited.

Cases.

Fansteel Metallurgical Corp., Matter of, 5 N.L.R.B. 930	13
I.A.M. v. N.L.R.B., 311 U.S. 72	6, 7
N.L.R.B. v. Appalachian Electric Power Co., No. 5134, C.C.A. 4	15, 16
N.L.R.B. v. Bradford Dyeing Association, 310 U.S. 318	6, 16
N.L.R.B. v. Burke Machine Tool Co., 133 F. (2d) 618	17
N.L.R.B. v. Clinton E. Hobbs Co., 132 F. (2d) 249	17
N.L.R.B. v. Fansteel Metallurgical Corp., 306 U.S. 240; 59 S. Ct. 490	4, 5, 9, 10, 11, 12, 13, 14
N.L.R.B. v. Great Southern Trucking Co. and L. A. Rawlinson, No. 4874, C.C.A. 4	15
N.L.R.B. v. Karp Metal Products Co., Inc., 134 F. (2d) 954	8, 14
N.L.R.B. v. National Seal Corp., 127 F. (2d) 776	8
N.L.R.B. v. P. Lorillard Co., 314 U.S. 512; 62 S. Ct. 397	6, 7, 14, 15
N.L.R.B. v. Pennsylvania Greyhound Lines Inc., 303 U.S. 261	16, 17

Page

N.L.R.B. v. Porcelain Steels, Inc., C.C.A. 6, Nov. 30, 1943 17

N.L.R.B. v. Virginia Electric & Power Co., 314 U.S. 469; 62 S. Ct. 348 10

P. Lorillard Co., Matter of, 16 N.L.R.B. 684 14

STATUTES.

Judicial Code, as amended, Secs. 239, 240, 28 U.S.C. Secs. 346, 347 2

National Labor Relations Act, Sec. 2 (6), (7), 49 Stat. 450, 29 U.S.C. Sec. 2 (6), (7) 2

National Labor Relations Act, Sec. 8 (1), (3), (5), 49 Stat. 452, 453, 29 U.S.C. Secs. 158 (1), (3), (5) 2, 3, 5

National Labor Relations Act, Sec. 10 (e), 49 Stat. 449, 29 U.S.C. Sec. 160 (e) 2

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Opinions Below.

The order of the Circuit Court of Appeals denying petitioner's petition for rehearing appears at page 123 of the Record. The opinion of the Circuit Court of Appeals filed on July 27, 1943, decreeing enforcement of the order of the respondent (R. 112-122), is reported in 137 F. (2d) 989. The findings of fact, conclusions of law and order of the respondent (R. 3-28) are reported in 44 N.L.R.B. 898.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 10 (e) of the National Labor Relations Act, 49 Stat. 449, and Sections 239 and 240 of the Judicial Code as amended, U.S.C. Title 28, Sections 346 and 347.

Question Presented.

The sole question presented is whether an employer shall be required to bargain collectively with a union, as the exclusive representative of the employees in an appropriate bargaining unit, which does not, at the time of issuance of the order of the Board, represent a majority of such employees and where the loss of majority has not occurred by reason of any unfair labor practices on the part of the employer.

Statement of the Case.

On June 19, 1941, a petition for investigation and certification of representatives of employees of petitioner was filed with the First Regional Office of the respondent at Boston, Massachusetts, Case No. I-R-725, by the Amalgamated Clothing Wo.kers of America, hereafter called the Union (R. 9). On July 24, 1941, the Union withdrew the said petition and filed charges of unfair labor practices against the petitioner in Case No. I-C-1797, known as Case No. C-2179 before the Board, which were later amended. The said charges, as amended, alleged violation by petitioner of Section 8 (1), (3) and (5) of the Act.

On March 2, 1942, the respondent issued its complaint in this proceeding. The complaint alleged that petitioner had engaged in unfair labor practices affecting commerce within the meaning of Section 8 (1), (3) and (5) and Section 2 (6)

and (7) of the Act. Thereafter, on March 13, 1942, petitioner filed its answer denying the unfair labor practices charged and challenging the jurisdiction of the Board.

A hearing was held at Lawrence, Massachusetts, from March 16 to March 24, 1942. On April 29, 1942, the Trial Examiner filed his intermediate report, finding violations of Section 8 (1) and (5) of the Act, but finding no violation of Section 8 (3), and recommending that petitioner cease and desist from such violations and take certain affirmative actions.

On May 28, 1942, the respondent granted petitioner's request to be heard in oral argument before the Board and scheduled the hearing for the purpose of oral argument on June 16, 1942. Thereafter petitioner filed exceptions to the intermediate report. Oral argument was postponed from June 16, 1942, and finally had before the respondent on June 30, 1942, and the respondent issued its decision and order on October 8, 1942.

Thereafter the respondent petitioned the Circuit Court of Appeals for the First Circuit for enforcement of its order. The cause was heard on June 2, 1943, and on July 27, 1943, a decree of the Court was entered enforcing the order of the respondent with the exception of paragraph 2 (c) and further ordering the petitioner to notify the Regional Director for the First Region of respondent in writing within ten days what steps it had taken to comply with said order. On August 6, 1943, the Court ordered a stay of its decree to permit petitioner to file a petition for rehearing.

On August 23, 1943, a petition for rehearing was filed by petitioner, which was denied by the order of the Court filed on September 13, 1943. Thereafter, on September 15, 1943, the stay of decree of August 6, 1943, was further continued. On January 10, 1944, petitioner's petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit was granted.

Petitioner's Position.

Petitioner's position is that where, according to the record in the proceeding, a union does not represent a majority of all the employees in an appropriate bargaining unit at the time of the issuance of an order of the Board and where the loss of majority was not caused by unfair labor practices on the part of the employer, the employer should not be required upon request to bargain collectively with such union as the exclusive representative of all the employees in such unit.

Argument.

The petitioner should not be ordered to bargain collectively with the Union as the exclusive representative of all the production and maintenance employees at petitioner's Lawrence, Massachusetts, plant, excluding executives, supervisors and clerical employees, because of the fact that at the time of the hearing before respondent the Union no longer represented a majority of such employees and such loss was not due to any unfair labor practices of petitioner.

A. Representation in the Unit as of March 5, 1942, the Date of Hearing before Respondent.

The respondent found that a sufficient number of the Union's members had ceased working for the petitioner to deprive the Union, as of March 5, 1942, of its majority status (R. 25). The only case which has been decided by the United States Supreme Court which rules squarely on this issue is *N.L.R.B.* v. *Fansteel Metallurgical Corp.*[1]

[1] 306 U.S. 240; 59 S. Ct. 490.

In the Fansteel case the Board had found that the Union had a majority on February 17, 1937, and found a refusal to bargain on the part of the employer in violation of Section 8 (5) of the Act. Thereafter, because of the unfair labor practices of the employer, the employees went on strike. The loss in majority occurred thereafter by the valid discharge of sit-down strikers.

In the Fansteel Metallurgical Corporation case [2] the Supreme Court stated:

> "In view of the change in the situation by reason of the valid discharge of the 'sit-down strikers' and the filling of positions with new men, we see no basis for a conclusion that after the resumption of work Lodge 66 was the choice of a majority of Respondent's employees for the purpose of collective bargaining. The Board's order properly requires Respondent to desist from interfering in any manner with its employees in the exercise of their right to self-organization and to bargain collectively through representatives of their own choosing. But it is a different matter to require Respondent to treat Lodge 66 in the altered circumstances as such a representative. If it is contended that Lodge 66 is the choice of the employees, the Board has abundant authority to settle the question by requiring an election."

Therefore, in the instant case, even if the Circuit Court of Appeals was right in sustaining respondent's finding of a refusal to bargain as of June 12, 1941, as it did, it is the contention of the petitioner that an order to recognize and to bargain collectively with the Union as the exclusive representative of the employees is not justified by the evidence and the law.

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[2] 306 U.S. 240, 261, 262; 59 S. Ct. 490, 498, 499.

In its findings in regard to this point the respondent referred to the Lorillard case and others decided by the Supreme Court (R. 26).[3] In the Lorillard case the Court in a *per curiam* decision cited the following cases as authority: *N.L.R.B.* v. *Bradford Dyeing Association*[4] and *I.A.M.* v. *N.L.R.B.*,[5] each of which was referred to by respondent.

It is important to note that in each of said cases cited by the Supreme Court in the Lorillard case there is a distinction from the instant case. In the Bradford case the Board considered a shift of membership from the T.W.O.C. to a union found to be company dominated, and found that, except for the unfair labor practices of the employer, the employees would have remained members of the T.W.O.C.[6]

In the I.A.M. case the facts are that the record did not disclose any change of majority status, which immediately differentiates it from the instant case. In the I.A.M. case the petitioner was an organization that had been found to have been assisted by the employer in securing a majority of the employees of the tool and die room. The Board found that a contract between the union and the employer

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[3] *N.L.R.B.* v. *P. Lorillard Co.*, 314 U.S. 512; 62 S. Ct. 397.

[4] 310 U.S. 318, 339-340.

[5] 311 U.S. 72, 83.

[6] Briefly the pertinent facts in the Bradford case are as follows: At various times prior to April 9, 1937, the company stated that it would never bargain with the C.I.O. On April 4, 1937, the C.I.O. had a majority. On April 6, 1937, a union found by the Board to be company dominated and instigated was formed. Between April 4th and April 9th a majority of the employees shifted from the C.I.O. to the company-dominated union. On April 9th the company refused to bargain with the C.I.O. The Board found "the record is clear that had it not been for the unfair labor practices of respondent in organizing and fostering the Federation and in persuading, intimidating and coercing employees to join the Federation and withdraw from the Textile Worker's Organizing Committee, respondent's employees would have remained members of the Textile Workers Organizing Committee."

covering the tool-room employees was invalid for that reason and for other reasons. The Board also ordered the company to bargain with another organization as the representative of the production employees.

The union in that case made no showing at the hearing that a majority of the production employees had shifted to it after the employer refused to bargain with the U.A.W. Nor did it seek leave from the Court to adduce such additional evidence. But the Union contended that, upon receiving a notification from it after the hearing had been closed, the Board should have ordered an election or at least made an investigation.

The Court held that no prejudicial error was involved in the failure of the Board to act.

> "Where as a result of unfair labor practices a union can not be said to represent an uncoerced majority the Board has the power to take appropriate steps to the end that the effect of those practices will be dissipated."[7]

Thus the I.A.M. case is not squarely in point on the instant case. In the instant case, to the contrary, the Board has found that the loss was not due to unfair labor practices.

In the Lorillard case the record did not disclose that the union had lost its majority because of loss of membership due to the fact that employees had voluntarily quit. There, after the hearing had been closed and after the Trial Examiner had rendered his report, a strike occurred. During the strike a union was formed which petitioned the Board for permission to intervene and filed a petition for investigation and certification of representatives.

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[7] 311 U.S. 72, 82; 61 S. Ct. 83, 89.

The Board denied the petition to intervene. In the administration of the Act there are long delays neeessarily incident to the procedure. If the Board were to permit the opening of the record on such a petition, it would necessarily involve further delays and hinder the administration of the Act. The Supreme Court held that the Board was not in error. It is respectfully submitted that the case is distinguishable from the case at bar.

The contention of respondent in this regard is also given weight by a recent decision of the Circuit Court of Appeals for the Second Circuit in the case of *N.L.R.B.* v. *Karp Metal Products Co., Inc.*, decided March 25, 1943.[8]

Another case decided by the Circuit Court of Appeals for the Second Circuit substantiates respondent's position.[9] There the respondent asked the Trial Examiner to require the union to prod: e its dues book showing who had paid dues and who had not. The union's by-laws provided that default by a member in payment of dues for three months would automatically cancel membership. The Trial Examiner denied respondent's request. The Court said:

> "The examiner refused the request, and the respondent asked nothing more; it did not suggest that it wished to prove that the union had taken any action to expel the delinquent members, or that the members had declared that the union should no longer represent them. Thus the only question before us is whether the members' default ipso facto ended the union's authority. We think it did not. . . . Perhaps these members' failure to pay their dues and their return to work contrary to the Union's order were evidence of a desire not to have the union represent them

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[8] 134 Fed. (2d) 954.

[9] *N.L.R.B.* v. *National Seal Corp.*, 127 F. (2d) 776, 779.

> any longer; but that was not the inevitable conclusion, . . . if the respondent meant to prove that the representation had ended, it was obliged to go further than it suggested to the examiner. As the point was presented to him, it was bad in law and his ruling was right."

The inference is clear that the Court's decision would have been different if the respondent had presented substantial evidence of loss of majority not due to unfair labor practices.

Petitioner contends again that in the case at bar the facts bring it clearly within the rule laid down by the Fansteel case. The Board found on the uncontroverted evidence that the loss of majority occurred through no unfair labor practices. In the Fansteel case the loss occurred through a valid discharge of sit-down strikers; in the instant case through voluntary quitting of employment (R. 25). The difference in the reasons for termination of employment between the Fansteel case and the instant case should not in any way affect the matter, since neither of the reasons involved an unfair labor practice on the part of the employer.

In its decision in the instant case the Board stated:

> "The Respondent introduced into evidence its payroll of March 5, 1942, by which it appears, as the Respondent asserted, at oral argument, that a sufficient number of union members had left the Respondent's employ by that date to affect the Union's majority. This alleged loss of majority is not determinative of the remedy to be ordered. *We have consistently held that the only means by which a refusal to bargain can be remedied is an affirmative order requiring the Employer to bargain with the Union which represented a*

majority at the time the unfair labor practice was committed" [10] (R. 25).

However, respondent points out that in the Fansteel case the strike of the employees was caused by a refusal to bargain with the union, which represented a majority of the employees at that time, an unfair labor practice; that the Board ordered the company to bargain with the union which had represented a majority of the employees at the time the unfair labor practice was committed; and that the Supreme Court *refused to enforce* the order because the majority had been lost by reason of the valid discharge of the employees.

Since at the time of the hearing the Union did not represent a majority, it would be an injustice to the employees to establish an exclusive bargaining representative for them. It is important to note that "the sanctions of the Act are imposed not in punishment of the employer but for the protection of the employees." [11]

The Circuit Court of Appeals for the First Circuit distinguished the instant case from the Fansteel case in the following language:

> "We are of the opinion that the Fansteel case is distinguishable from the case at bar. Because of the violence of the striking employees the employer properly discharged them. *The Union, by the action of its members, forfeited its right to be recognized as the bargaining representative even though at a prior date a majority of the employees had designated it as their representative.* An act had intervened from the date upon which it could be said that the Union was the

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[10] Italics mine.

[11] *N.L.R.B.* v. *Virginia Electric & Power Co.*, 314 U.S. 469, 477; 62 S. Ct. 348.

majority representative which permitted the employer to discharge a number of employees and thereby deprive the Union of its status as the majority representative" (R. 119).

It is respectfully submitted that the basis stated by the Court as above quoted is inconsistent with its decision in the instant case. In the Fansteel case the Board found that the employees involved had been discharged in violation of the National Labor Relations Act, which finding the Supreme Court held did not rest upon substantial evidence. The Act referred to by the Circuit Court of Appeals involved the right of an employer to discharge employees for cause. It is submitted that, where the loss of majority occurs from the exercise of an employer's right, it can be no stronger or more valid than where the loss of majority occurs by reason of employees' voluntarily quitting their employment. The intervening act in the instant case was the voluntary cessation of employment. There is not an iota of evidence in the record that this cessation of employment was caused by any wrongful actions of the respondent. There is a specific finding by the Board that a sufficient number of Union members had left the petitioner's employ by the date of the hearing to affect the Union's majority.

If the language used by the Circuit Court of Appeals in distinguishing the Fansteel case, by stating that the union, by the action of its members, may forfeit its right to act as the bargaining representative, be intended by the Court as referring only to the fact of the valid discharge of employees, then petitioner maintains that such action does not in fact constitute a valid distinction. If the aforesaid language be intended by the Court to mean that wrongful acts by the members of a union, whether involving dis-

charge of such members or not, shall cause the union to forfeit its right to represent the employees on matters of collective bargaining, and that such is the distinction between the Fansteel and the instant case, then petitioner respectfully contends that such a conclusion by the Court is not in accord with the National Labor Relations Act or the decision of the Supreme Court. The Act places restrictions only on the activities of employers. An employer is not excused from its obligations to bargain with a union because of the misconduct of a union or its representatives or members.

The Circuit Court of Appeals stated in its decision:

> "It appears in the case before us that the loss of a majority was due to a voluntary quitting on the part of certain employees of Respondent. From the Board's treatment of Respondent's argument in this respect, however, it would seem that it is of the view that the loss in majority may be traced to the refusal to bargain with the Union on June 12, 1941" (R. 121).

It is respectfully submitted that it is the function of the Court to determine whether the findings of the Board rest upon substantial evidence and that it is improper and prejudicial to petitioner for the Court to supply findings which have not been made.

It is respectfully submitted that nowhere in the Board's decision is there a finding that the loss of majority was due to any unfair labor practices on the part of petitioner, and it is submitted that the petitioner is entitled to the Board's judgment on this matter supported by substantial evidence and that, where such finding was not made by the Board, it cannot be supplied by the Court. From the very fact that such a finding has been omitted it would appear

that the Board did not believe such a finding would have been warranted on the record.

Moreover, it is interesting to note that substantially such a finding was made by the Board in the Fansteel case and decided against by the Supreme Court. In its decision the Board stated:

> "The Respondent cannot be heard to assert that on March 3 and 5 no longer was the Union the representative of the majority of the employees. The evidence does not show that any of the Union members had resigned by that time, and any defections from the Union's representative authority implied in the return to work of some of the members is clearly ascribed to the unlawful conduct of the Respondent in continuing to rebuff all efforts of the Union to meet and settle the strike. Any such defections may accordingly be disregarded." [12]

The Circuit Court of Appeals in its opinion in the case at bar stated that respondent's dilatory tactics, its refusal to recognize the Union and other actions deprived the Union of the opportunity of strengthening its organization. It is submitted that the Board made no such finding and the Court cannot supply it for the Board. It is called to the attention of the Court that the same reasoning could have been applied with more merit to the Fansteel case, for there the strike which resulted in the discharge of the employees was caused by the unfair labor practices of the employer. In fact, the entire language of the Circuit Court of Appeals in the instant case with respect to findings which it said the Board might reasonably have made, and which petitioner contends were not made, could be

[12] 5 N.L.R.B. 930, 945, 946.

applied with at least equal if not greater merit to the Fansteel case.

The Circuit Court of Appeals in the case at bar places great reliance on the Lorillard case.[13]

In its opinion in the instant case, in discussing the Karp case [14] the Court stated:

> "But it appears from the Lorillard case that the only consideration which the Board gave to the possible shift in the majority was to say that it would ignore such a shift in order to effectuate the policies of the Act" (R. 121).

It is respectfully contended that the Board did much more than that. The Board found in the Lorillard case as follows:

> "The necessary delays incident to the adjudication of a dispute have postponed the Board's Order until a time considerably subsequent to the original wrongful refusal to bargain. The refusal to bargain collectively disrupts the morale of the men, has a deterring effect upon the organizational activity of the Union and a discouraging influence on members already gained which tends to induce them to drop from the ranks." [15]

The Supreme Court recognized the fact that such finding had been made in its opinion in the Lorillard case as quoted in the opinion of the Circuit Court of Appeals in the instant case: "The Board had considered the effect of a possible shift in membership . . ." (R. 120).

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[13] *N.L.R.B.* v. *P. Lorillard Co.*, 314 U.S. 512; 62 S. Ct. 397.

[14] *N.L.R.B.* v. *Karp Metal Products Co., Inc.*, 134 F. (2d) 954 (C.C.A. 2d, 1943).

[15] 16 N.L.R.B. 684, 700.

Such findings are not present in the instant case. In addition it must be remembered that in the Lorillard case the loss of majority was never shown on the record and that the alleged loss was brought to the attention of the Board after the hearing had closed and after the Trial Examiner had rendered his intermediate report, which in itself differentiates it substantially from the instant case. It is submitted that in the instant case, when the Court discusses the possible accessions in membership from new or old employees, the Court is merely speculating on conclusions that the Board might have drawn, but did not, for reasons known only to it.

On January 10, 1944, two decisions were rendered by the Circuit Court of Appeals for the Fourth Circuit *re* cases involving loss of majority. Both of these cases are clearly distinguishable from the instant case.[16]

In the Great Southern case the cause arose on a petition by the N.L.R.B. for an order holding the company in contempt of a decree of the Court entered on April 13, 1942, enforcing the Board's order to bargain upon request with the union. After entry of the decree of the Court a petition was signed by a majority of the employees stating that they did not desire to be represented by the union. The company asked the Board to redetermine the union's majority status. The Board denied its request, apparently on the ground that the company had not yet bargained with the union. The crux of the Court's decision appears to be shown by its statement:

> "If the employees do now affirmatively oppose the company's bargaining with the union for a contract affecting them, it is only because the company, in vio-

[16] *N.L.R.B.* v. *Great Southern Trucking Co. and L. A. Rawlinson*, No. 4874, C.C.A. 4; *N.L.R.B.* v. *Appalachian Electric Power Co.*, No. 5134, C.C.A. 4.

lation of our decree, has continued its policy of unlawful antagonism to the union."

Whether or not the Circuit Court of Appeals for the Fourth Circuit is correct in its decision is immaterial in so far as the instant case is concerned.[17] In the Great Southern case the alleged loss of majority takes place not only after the hearing has been closed and the Board's order rendered but even after the Board's order has been affirmed by the Court. In addition the aforesaid case appears to involve a shift in membership. In the instant case there is no shift in membership but a loss in membership occurring prior to the time of the Board's hearing and due solely, as found by the Board, to the voluntary quitting of employment by union members.

In the Appalachian Electric Power case the Board certified a union as the exclusive bargaining representative of the employees after an election. Subsequently a petition was circulated by a majority of the employees saying that they no longer wished to be represented by the union. Thereupon the company refused to bargain with the union. The Court enforced the Board's order requiring the company to bargain with the union. Again this case is distinguishable from the instant case. A shift is involved such as occurred in the Bradford and Great Southern cases. Another basis for distinction may well be that in the Appalachian case there is no real assurance that the majority status has been lost, but merely an allegation, whereas in the instant case the Board itself found that the majority had been lost.

In its brief in opposition to the petition for writ of certiorari the Board cited three Circuit Court of Appeals decisions as squarely supporting the First Circuit's deci-

[17] Cf. *N.L.R.B.* v. *Pennsylvania Greyhound Lines Inc.*, 303 U.S. 261 (1938).

sion in the instant case.[18] All of these cases are clearly distinguishable.

In the Hobbs case there was no evidence in the record of loss of the union's majority. The question was first raised in the company's answer to the Board's petition for enforcement of its order.[19] In the Burke Machine case the loss of majority at the time of hearing, if any, was involved in a shift to a company-instigated organization. After the hearing the company petitioned for leave to adduce additional evidence to show that the union no longer represented a majority, which the Board refused to permit and was upheld by the Court.

In the Porcelain Steels case the loss of majority was shown at the hearing but was found upon substantial evidence to have been caused by a shift to a company-instigated organization.

Conclusion.

The decision of the Court below is incorrect and should be reversed.

By its Attorneys,

BENJAMIN E. GORDON,

ARTHUR V. GETCHELL.

18 Tremont Street,
Boston, Mass.

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[18] *N.L.R.B.* v. *Clinton E. Hobbs Co.*, 132 F. (2d) 249 (C.C.A. 1); *N.L.R.B.* v. *Burke Machine Tool Co.*, 133 F. (2d) 618 (C.C.A. 6); *N.L.R.B.* v. *Porcelain Steels, Inc.* (not yet reported, decided Nov. 30, 1943) (C.C.A. 6).

[19] Cf. *N.L.R.B.* v. *Pennsylvania Greyhound Lines Inc.*, *supra*.